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No. 80-41

In the Supreme Court of the United States

OCTOBER TERM, 1979

PEOPLE OF THE STATE OF ILLINOIS, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission fulfilled its responsibilities under the Interstate Commerce Act and the National Environmental Policy Act in approving a consolidation of railroad facilities at Yard Center, Illinois, without imposing safety and environmental conditions to guarantee railroad compliance with local, state, and other federal regulations.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-9a) is not reported. The decision and order of the Interstate Commerce Commission (Pet. App. 10a-22a) are reported at 360 I.C.C. 115.

JURISDICTION

The judgment of the court of appeals (Pet. App. 57a) was entered on April 24, 1980. A petition for rehearing was denied on June 5, 1980 (Pet. App. 58a). The petition for a writ of certiorari was filed on July 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Louisville and Nashville Railroad Company ("L&N") operates two roughly parallel routes between Chicago, Illinois, and Nashville, Tennessee, and maintains a separate freight classification yard[1] for each line, one near South Hammond, Indiana, and one approximately six miles away at Yard Center near Dolton, Illinois. In 1975 the L&N concluded that by dispensing with the independent operation of the Hammond Yard and consolidating these operations at Yard Center, it could save approximately $300,000 annually. In order to implement its consolidation plan by rerouting traffic from the Hammond Yard to Yard Center, L&N needed the approval of the Interstate Commerce Commission under

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[1]At a classification yard, the railroad performs various switching operations either to add cars to, or to separate cars from, a train. Those operations enable the railroad to control the composition of a train.

49 U.S.C. 11343[2] for its acquisition of trackage rights[3] over 5.6 miles of the Grand Trunk Western Railroad Company ("GTW") and also needed authority from the Commission under 49 U.S.C. 10901[4] to construct a short connecting track between its line and the main line of the GTW.

L&N filed its application for trackage rights and a construction certificate in August 1975. The Commission's environmental impact statement prepared in connection with L&N's application concluded that the consolidation of classification activities would increase noise, traffic and safety problems in the area of Yard Center, but would eliminate those problems at the Hammond Yard, which was to be terminated (Pet. App. 47a). On balance, the statement concluded that the environmental consequences of the consolidation would be beneficial, stating (*ibid.*):

> A land resource [at South Hammond] could be made available for public use. Furthermore, an overall savings in fuel consumption, as well as a net reduction of air pollutants, could be realized since much of L&N's traffic would be moving over a

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[2]Formerly Section 5(2) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 5(2). The Act was recodified by Pub. L. 95-473, 92 Stat. 1337 *et seq.* Generally, Section 11343 provides that railroad consolidations, mergers, and the acquisition of control or rights over another carrier's property must be authorized by the Commission.

[3]"Trackage rights" involve continuing or permanent easements or licenses granted to one carrier permitting it to operate over the track and right-of-way of another carrier. *Chicago, R.I. & P. R.R.* v. *Chicago, B. & Q. R.R.*, 437 F. 2d 6, 10 (7th Cir. 1971).

[4]Formerly Section 1(18) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 1(18). That section requires a railroad carrier to obtain a certificate of public convenience and necessity to construct a new railroad line.

shorter route. The proposed action would be commensurate with land use plans at South Hammond and regional transportation goals.

After a hearing, a Commission administrative law judge ("ALJ") recommended that the application be denied (Pet. App. 27a-56a). The ALJ concluded, *inter alia*, that: (1) the proceedings did not involve a major federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321 *et seq.* (Pet. App. 51a); (2) "the proposal would result in the elimination of duplicating rail facilities and could result in more efficient and economical operations (with attendant savings)" (*id.* at 52a); and (3) this proceeding was not the proper forum to establish or enforce noise standards for rail yards or to entertain collateral arguments raising other environmental concerns (*ibid.*).

Notwithstanding those conclusions, the ALJ denied the application on the basis of "local public health, safety, and noise pollution factors" at Yard Center (Pet. App. 53a). The ALJ was particularly concerned about inoperable fire hydrants and the need to develop noise pollution control measures (*ibid.*). He indicated that the transaction should only be approved subject to certain enumerated conditions[5] but that the L&N had not shown its "ability to control or influence the implementation of acceptable conditions * * *" (*ibid.*). The ALJ reasoned that since the record did not indicate that the railroad operators[6] of Yard Center "could or would implement and

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[5]The specific conditions are set out at Pet. 5-6; Pet. App. 53a-54a.

[6]Yard Center is jointly owned by the L&N and the Missouri Pacific Railroad Company ("MoPac"). Each owns a 50% interest in the facility. Both carriers have equal rights and responsibilities with respect to Yard Center, although, by agreement, MoPac operates the yard.

abide by conditions that would be required prior to approval of the proposal" the application should simply be denied (*id.* at 54a).

On review, the Commission reversed the ALJ and granted trackage rights and the construction application (Pet. App. 10a-22a). In analyzing the environmental issues, the Commission balanced the operational and environmental benefits against the adverse environmental consequences. Benefits noted by the Commission included (1) the elimination of duplicating rail facilities through consolidation of the two freight yards (*id.* at 14a-15a); (2) elimination of noise, traffic, and safety problems in the Hammond area (*id.* at 16a); and (3) a net reduction of air pollutants and energy consumption through shorter and more efficient operations (*ibid.*). The Commission also observed (*ibid.*) that the L&N's planned installation of crossover tracks and power controlled switches would mitigate certain potential traffic congestion problems that were a main concern of those opposing the plan. The Commission concluded that since the environmental and operational benefits outweighed the harmful environmental impacts, the application should be granted. In addition, the Commission determined that on the facts of this case, imposition of the conditions recommended by the ALJ was not warranted, since there was no reason to suppose that L&N would not comply with relevant safety and environmental ordinances, which the Commission noted (*id.* at 17a) are outside its province and are properly enforced by other federal, state, and local agencies.

On petition for review in the court of appeals, petitioners argued principally that the Commission

applied contradictory standards in weighing environmental impacts,[7] that the Commission erred in reversing the ALJ without adequate findings, and that the Commission committed certain procedural errors. Petitioners made only one passing reference to NEPA.

In its decision affirming the Commission's order the court of appeals found no inconsistency in the Commission's findings with respect to the environmental impact of the proposed action (Pet. App. 4a) and rejected petitioners' procedural claims. On the issue of whether the Commission had adequately explained its reasons for reversing the ALJ, the court of appeals found (*id.* at 5a, quoting *Greater Boston Television Corp.* v. *FCC*, 444 F. 2d 841, 853 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)) that the Commission "more than 'made clear not only its awareness of what the [ALJ] had concluded, but also its reasons for taking a different course.' " The court of appeals did not address petitioners' argument regarding deference to local regulations.

ARGUMENT

This case rests largely on its own peculiar facts and presents no conflict among the circuits or legal issue of general importance warranting this Court's review. The Commission's decision in this case approving the L&N's proposed plan of consolidating two freight yards does not present a question of its responsibilities under NEPA. The Commission made an unchallenged finding that this case did not involve a major federal action significantly affecting the quality of the human environment within the meaning of NEPA. Nevertheless, it fully considered the

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[7]This argument, not pursued here, was premised on the application of different standards in the Commission's decision on the merits and the Commission Chairman's decision granting an administrative stay (see Pet. App. 2a-4a).

environmental impacts presented. The Commission's decision to reverse the ruling of its ALJ and approve the plan without imposing environmental conditions was based on the Commission's judgment, affirmed by the court of appeals, that those conditions were not necessary to ensure compliance with environmental standards.

1. Petitioners' principal argument in favor of review rests on an asserted need to clarify the Commission's environmental responsibilities under NEPA in passing upon railroad facility consolidations under 49 U.S.C. 11343 (formerly Section 5(2) of the Interstate Commerce Act). Petitioners contend (Pet. 10-11) that in view of several announced railroad merger plans that will be considered by the Commission under the latter statute, this case provides the Court with an opportunity to "settle" the law at an early stage.[8]

Petitioners' argument is insubstantial. This case, which even the ALJ characterized as "a reasonable, minor proposal for the rerouting of two daily trains" (Pet. App. 55a), is demonstrably insignificant in comparison with the cases and proposed mergers cited by petitioners that have been or will be decided under the same statute.[9] Moreover, in light of the Commission's unchallenged finding (Pet. App. 17a) that its approval of L&N's

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[8]49 U.S.C. 11343 governs the Commission's consideration of major railroad mergers as well as such relatively minor matters as the trackage rights application involved in this case.

[9]For example, in *Burlington Northern, Inc.-Control & Merger, St. L.*, 360 I.C.C. 784 (1980), cited by petitioners (Pet. 10), the Commission considered the merger of two major railroad systems into a single system operating over more than 29,000 miles of track through the northern tier of states between the Pacific Northwest and the Great Lakes, and between the Great Lakes and the Gulf of Mexico (360 I.C.C. at 793). In contrast, the trackage rights issue considered under the same statute in this case involves 5.6 miles.

application is not a major federal action within the meaning of NEPA, this case is not a proper vehicle for the Court to define the Commission's environmental responsibilities in this area.[10]

2. Petitioners' second contention (Pet. 11) is that the Commission's refusal to impose environmental conditions raises significant jurisdictional and procedural problems under NEPA.[11] This contention is also without merit. Petitioners' reliance on *Environmental Defense Fund, Inc.* v. *Armstrong*, 352 F. Supp. 50, 58 (N.D. Cal. 1972), aff'd, 487 F. 2d 814 (9th Cir. 1973), cert. denied, 416 U.S. 974 (1974). and *Hanly* v. *Kleindienst,* 484 F. 2d 448, 449 (2d

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[10]Even assuming that the Commission's refusal in this case to enforce compliance with certain local, state, and federal regulations through imposition of conditions somehow falls short of its responsibilities under NEPA, the case does not present a question of substantial or recurring importance. Although the Commission determined that the facts of the case did not warrant imposition of the environmental conditions recommended by the ALJ (Pet. App. 17a), it unequivocally rejected arguments that it does not have the power to impose reasonable conditions (*id.* at 14a n.5 & 17a). The Commission has not foreclosed its option to take a more activist approach in the future in imposing environmental conditions should the situation warrant it.

[11]Logically, one does not reach the question of whether the Commission's statement concerning enforcement of compliance with environmental statutes and regulations constitutes a failure to meet its responsibilities under NEPA, unless one assumes noncompliance with environmental regulations. The ALJ's recommended conditions were premised on that assumption, *i.e.*, that the railroad operators of Yard Center could not be trusted to comply with certain environmental standards. The Commission itself was unwilling to make that assumption, stating that it had no reason to believe that the railroads would fail to comply (Pet. App. 17a). Thus, the issue presented by the Commission's refusal to impose environmental conditions in this case is not directly related to NEPA, but rather is a question of whether the Commission gave adequate reasons for reversing the ALJ. The court of appeals correctly held (Pet. App. 5a) that the Commission "more than" made clear its reasons for reversing the ALJ.

Cir. 1973), cert. denied, 416 U.S. 936 (1974), is misplaced. Neither these cases nor any other authority we are aware of obligates each federal agency to require compliance with the health and safety regulations of other agencies. It is not the Commission's function to enforce such compliance. In this case, the Commission analyzed and balanced the environmental factors, based upon an environmental impact statement, in the context of carrying out its statutory obligation to determine whether the proposed transaction would be "consistent with the public interest" (49 U.S.C. 11344(c)). Petitioners do not challenge the Commission's balancing approach or cite any authority demonstrating that that approach is inconsistent with NEPA.[12]

In essence, petitioners would have the Court substitute its judgment for that of the Commission as to the environmental consequences of the Commission's action.[13] That approach repeatedly has been soundly

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[12]Petitioners argue, implicitly (Pet. 12), that the Commission did not fully consider the cumulative impact at Yard Center resulting from a series of transactions approved by the Commission. The Commission specifically rejected that allegation on petition for administrative review (Pet. App. 25a). Moreover, the environmental impact statement that was the basis for the Commission's balancing of benefits and adverse impacts considered both the pre-existing and incremental (*i.e.*, cumulative) effects of the plan.

[13]It also appears that petitioners are here advocating a new standard of judicial review in passing on the merits of agency action *after* preparation of an impact statement. Although some courts have taken the position that NEPA requires that an agency decision not to prepare an impact statement should be measured by a standard of reasonableness (see *Concord Township* v. *United States*, No. 79-1887 (3d Cir. June 23, 1980), slip op. 10-11, and authorities cited therein), none has applied that standard to the merits of the agency's decision following preparation of the impact statement. Rather, the courts in such circumstances have applied the traditional arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. 706(2). See, *e.g.*, *Cross-Sound Ferry Services, Inc.* v. *United States*, 573 F. 2d 725, 731-732 (2d Cir. 1978).

rejected by this Court. See *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, No. 79-168 (Jan. 7, 1980); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 555 (1978); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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